

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHWEST UNITED EDUCATORS, :

Complainant, :

vs. :

JOINT SCHOOL DISTRICT NO. 1, TOWNS OF :

WINTER, DRAPER, OJIBWA, MEADOWBROOK, :

RADISSON, COURDERAY, VILLAGES OF :

RADISSON AND COUDERAY, SAWYER COUNTY, :

TOWN OF HUBBARD, RUSK COUNTY; BOARD :

OF EDUCATION OF JOINT SCHOOL DISTRICT :

NO. 1, TOWNS OF WINTER, DRAPER, OJIBWA, :

MEADOWBROOK, RADISSON, COUDERAY, :

VILLAGES OF RADISSON AND COUDERAY, :

SAWYER COUNTY, TOWN OF HUBBARD, :

RUSK COUNTY, :

Respondents. :

Case XI
 No. 20301 MP-603
 Decision No. 14482-B

Appearances:

Mr. Gregory A. Wilson, Staff Counsel, Wisconsin Education Association Council, appearing on behalf of the Complainant.
Mr. Charles Ackerman, Labor Consultant, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators, having filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, alleging that Joint School District No. 1, Towns of Winter, Draper, Ojibwa, Meadowbrook, Radisson, Couderay, Villages of Radisson and Couderay, Sawyer County, Town of Hubbard, Rusk County; Board of Education of Joint School District No. 1, Towns of Winter, Draper, Ojibwa, Meadowbrook, Radisson and Couderay, Sawyer County, Town of Hubbard, Rusk County, Winter, Wisconsin, have committed prohibited practices within the meaning of Section 111.70, Municipal Employment Relations Act (MERA); and Stephen Schoenfeld, a member of the Commission's staff, having conducted a hearing in the matter on April 20, 1976, at Winter, Wisconsin, and prior to any further action, Stephen Schoenfeld having, on June 30, 1976, with the consent of the parties, attempted to resolve the issues in the matter; and that, however, the parties having been unable to reach an accord with regard to said issues, and the Commission, being satisfied that an examiner be appointed to issue Findings of Fact, Conclusions of Law and Order in the matter; and thereafter the Commission having appointed Dennis P. McGilligan, a member of the Commission's staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes, and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Northwest United Educators, hereinafter referred to as the Complainant Union, is a labor organization within the meaning of Section 111.70, Wisconsin Statutes; that Robert E. West is the Executive Director of the Complainant organization; and that Alan D. Manson is a representative of said organization.

2. That the Complainant labor organization is recognized by the Joint School District No. 1, Towns of Winter, et al, as the exclusive collective bargaining representative for all full-time employes of the Winter School District engaged in teaching, and including the classroom teachers, guidance counselors and librarians, but excluding the following: administrators and principals; non-instructional personnel; office, clerical, maintenance and operation employes; substitute teachers, student and/or intern teachers.

3. That Joint School District No. 1, Towns of Winter, Draper, Ojibwa, Meadowbrook, Radisson, Couderay, Villages of Radisson and Couderay, Sawyer County and Town of Hubbard, Rusk County and Board of Education of Joint School District No. 1, Towns of Winter, Draper, Ojibwa, Meadowbrook, Radisson, Couderay, Villages of Radisson and Couderay, Sawyer County, Town of Hubbard, Rusk County, hereinafter referred to as the Respondent District or District and Respondent Board or Board are, respectively, a public school district organized under the laws of the State of Wisconsin and a public body charged under the laws of the State of Wisconsin with the management, supervision and control of said district and its affairs.

4. That Complainant Union and Respondent Board were parties to a collective bargaining agreement commencing July 1, 1974, and terminating June 30, 1975; that said agreement provided, inter alia, at page 6, Section XVI-Review, that:

"A. The salary schedule, written agreement, and extra pay schedule shall be negotiated annually, starting no later than January, by the Board of Education and the NUE-Winter."

that Complainant Union and Respondent Board, through their respective bargaining teams, commenced negotiations on May 13, 1975 over the wages, hours and working conditions of the aforementioned teaching personnel in the employ of the Respondent District for the 1975-76 school year.

5. That at all times pertinent hereto, William Keigan, has been the District Administrator for the Respondent District and has been an agent of said Respondent and Respondent Board, acting on their behalf.

6. That at all times material herein, Charles Ackerman, was a labor consultant and in that capacity assisted the Respondent District in negotiations with the Complainant Union.

7. That at all times pertinent hereto, Robert E. West, Alan Manson and James Bolduc, a science teacher and head negotiator for the local union, served as spokespersons for the bargaining committee of the Complainant Union; and that Charles Ackerman and William Keigan served in a similar role for the Respondent Board.

8. That on May 13, 1976, the representatives of the Complainant Union and Respondent Board met for the purpose of bargaining on a new contract and salary schedule; that at said meeting the Complainant Union's bargaining committee submitted its proposals for a 1975-76 labor agreement between the Complainant Union and Respondent Board to the representatives of the Respondent Board; that in said proposal the Complainant Union made demands for a revised salary schedule and increment structure, increased wages, a new school calendar, additional sick leave, changes in the nature of personal leave, an eight hour work day, fair share, improved insurance and retirement benefits, a teacher evaluation process and certain language changes; that Charles Ackerman stated that the Respondent Board's proposal was to leave the 1974-75 contract intact without change except for monetary modifications; that thereafter the parties engaged in a general discussion of cost controls, the Governor's (Lucey) budget, and the impact on bargaining of AB 605.

9. That the representatives of the parties next met on June 2, 1975; that during the course of said meeting the representatives of the parties went over the aforementioned Complainant Union's proposal item-by-item; that a large portion of the time was spent in the discussion of teacher evaluation; that the representatives of the Complainant Union indicated they had flexibility in this area but the representatives of the Respondent Board took the position that there would be no agreement on a teacher evaluation procedure; that the representatives of the parties again discussed the impact of cost controls and AB 605; that Ackerman restated the Respondent Board's position that it didn't intend to change anything in the contract except for the monetary amounts; that the session lasted approximately forty-five minutes.

10. That on October 2, 1975 representatives of the Complainant Union and Respondent Board met for the purpose of collective bargaining with a mediator from the Wisconsin Employment Relations Commission; that through the mediator the representatives of the Complainant Union submitted to the representatives of the Respondent Board a number of package proposals; that in addition the representatives of the Complainant Union indicated to the representatives of the Respondent Board a number of different areas of the contract in which it was willing to make movement; that in response thereto, the representatives of the Respondent Board answered and discussed each of the Complainant Union's proposals; that basically the bargaining committee of the Respondent Board through its spokesman Ackerman took the position that the contract should remain intact with the exception of personal leave days, sick leave and funeral leave, that during the course of the above meeting the Respondent Board made its first and final written offer to the Complainant Union which included a total increase in wages of \$16,000 to be distributed in any manner the teachers wanted and changes in the areas of personal leave and funeral leave; that the representatives of the Complainant Union rejected said offer because it did not include enough money and there was no indication that the Respondent Board was willing to work out an agreement in the other areas of the proposed contract.

11. That by letter dated October 7, 1975 West indicated to the Respondent Board that the Complainant Union was interested in arriving at a fair and equitable agreement and wished to continue bargaining over same; that thereafter the representatives of the parties met again in October in a brief attempt to settle their differences over the proposed 1975-76 collective bargaining agreement, but without success.

12. That the Respondent Board at a meeting on the third Monday of October, 1975 in an executive session discussed informally the possibility of unilaterally implementing wages and conditions of employment which were the subject of negotiations for a 1975-76 labor contract; that subsequently in early November Ackerman recommended to the members of the Respondent Board that the Board unilaterally implement wages and conditions of employment as noted above; that later at its regular meeting on November 17, 1975 the Respondent Board took formal action to authorize the unilateral implementation of wages and conditions of employment which had been the subject of negotiations for a 1975-76 labor contract; that thereafter on November 18, 1975 Superintendent Keigen met with James Bolduc, and informed him that the Respondent Board had acted unilaterally to authorize implementation of its last offer in bargaining; that said offer contained changes from the previous year's contract as follows: a total increase in wages of \$16,000 unilaterally distributed among the bargaining unit employes by the Board, a reduction in the number of personal leave days from three to one and a new section on funeral leave; that Keigen informed Bolduc at the same time that the Respondent Board's action was taken so the teachers could receive the full amount of money budgeted for raises prior to Christmas; that Keigen further stated to Bolduc that there was room for more negotiations between the parties especially in the area of contract language; that Bolduc expressed interest in the idea that the Respondent Board was attempting to get the money to the teachers but did not state approval of the Board's unilateral action and indicated a desire to continue negotiations over a 1975-1976 labor agreement; that Bolduc further stated to Keigen that he would take the unilaterally adopted document back to the Union membership for a vote; that following this conversation Keigen, as directed by the Board's action of November 17, 1975, implemented wages and conditions of employment which had been the subject of negotiations for a 1975-76 labor contract; that at no time prior to November 18, 1975, did any representative of the Respondent Board indicate to any representative of the Complainant Union that it was considering or intended to implement unilaterally its last offer in bargaining; that at no time during this same period did the representatives of the Complainant Union indicate to the representatives of the Respondent Board that the Union no longer wished to continue bargaining or that the Union did not have flexibility in regard to its proposals; that at the time of the above unilateral action by the Board the parties were not at an impasse over bargaining the 1975-1976 labor agreement.

13. That approximately one week after November 18, 1975 the membership of the Complainant Union met and discussed the matter and subsequently voted unanimously to reject the contract unilaterally implemented by the Respondent Board and containing wages and conditions of employment for the 1975-76 school year; that representatives of the Complainant Union communicated said rejection to the members of the Respondent Board at the Board's meeting in December of 1975 and expressed a desire to continue negotiations over a 1975-76 labor agreement; that the representatives of the Respondent Board told the representatives of the Complainant Union that they should contact Ackerman.

14. That on November 25, 1975 West sent the following letter to Mr. Aubrey Magnuson, Clerk of the Respondent Board:

"Northwest United Educators is appalled at the flagrant violation of Wisconsin Statute 111.70 in the Board of Education's action of unilaterally implementing its last offer. While we apparently are in agreement that the teachers should get their raises as soon as possible, we are certainly not in agreement with respect to the amount and to the other proposals still at issue.

We strongly object to the failure of Mr. Ackerman to bargain in good faith by refusing to discuss the issues and by making only one proposal and refusing to move from it. Mr. Ackerman has consistently shown his insensitivity to our problems by his failure to make meaningful responses. He has walked out twice and during mediation made no effort to arrive at an agreement.

In light of this outlandish action of unilateral implementation, we request that you cease and desist from continuing to apply any unilateral changes in the Winter teachers' condition of employment. We also request that we meet immediately to arrive at a satisfactory collective bargaining agreement."

that by letter dated December 3, 1975 Magnuson informed West that he had forwarded the above letter to Ackerman.

15. That by memo sent to the employees of the Respondent District (including members of the aforementioned bargaining unit represented by the Complainant Union) in the middle of December, 1975, Keigan indicated that the Respondent Board had decided to unilaterally change the health insurance carrier and policy; that prior to the above action the representatives of the Complainant Union and Respondent Board discussed the possibility of changing insurance carriers at their June 2, 1975 bargaining session; that at said session the representatives of the Complainant Union suggested changing the insurance carrier to the Union's insurance carrier; that Ackerman replied that the Respondent Board was satisfied with the present carrier and would maintain the WPS policy; that the parties did not discuss the matter further in negotiations; that prior to the above decision by the Respondent Board there was no communication by any representative of the Board to the Complainant Union that it was considering or had decided to make the above changes in health insurance; that the parties were not at bargaining impasse over same; that the above action of the Respondent Board was contrary to the terms of the 1974-1975 labor agreement between the parties, and the Board's own proposals during negotiations.

16. That on December 19, 1975 Keigen sent the following letter to Bolduc:

"This is to acknowledge our conversation of 12/16/75 in which I advised you to write a letter to Mr. Ackerman naming the dates you have open to meet to discuss the 1975-76 contract."

17. That on January 5, 1976 West sent the following letter to Ackerman:

"I have received notification from the Winter Board of Education that our request for a meeting has been forwarded to you. A great deal of time has passed since our request without a response from you. I suggest we meet on January 13, 1976 at 7:00 p.m. at the Radisson School. If I do not hear from you, I will interpret your actions as a refusal to bargain and take appropriate action."

that in response thereto, Ackerman sent the following letter to West:

"In answer to your letter of January 5, 1976. Would you please check with Mr. James Bolduc of NUE - Winter concerning the letter sent to him on Dec. 19, 1975 conveying the boards instructions."

18. That West sent the following letter to Ackerman on January 22, 1976:

"After investigating your response to my request for a bargaining session, I conclude that you will not meet to discuss the 1975-76 contract. Further, you will only discuss the 1976-77 agreement. Let me assure you that we desire to bargain on the terms of both agreements. We are prepared to make further concessions to attempt to arrive at an equitable settlement. We object to your implementing changes in the items being negotiated for the 1975-76 contract. We wish to bargain especially on the matters of wages, insurance and leaves. As you know, you have made unilateral changes in all of these areas. We hope an equitable settlement can be reached.

Please contact me as soon as possible with respect to dates when we can meet to continue bargaining.

P.S. Charlie, we are available to meet any time Monday through Friday next week. Please notify me as soon as possible."

that Ackerman replied by letter dated January 25, 1976 as follows:

"In reference to your letter of January 22, your conclusion is wrong; I would be delighted to meet and discuss the 1975-76 contract. I can meet on Thursday, January 29 at 7 p.m. at the Winter High School."

19. That the representatives of the Complainant Union and the Respondent Board met for the last time regarding the 1975-76 collective bargaining agreement on January 29, 1976; that the representatives of the Complainant Union indicated to the representatives of the Respondent Board that the Union was still desirous of negotiating over the 1975-76 labor agreement and had room for movement on its issues; that the representatives of the Respondent Board took the position that "the contract was implemented and that the parties should go on to negotiate the 1976-1977 collective bargaining agreement"; that the parties were unsuccessful in resolving their differences over a 1975-1976 collective bargaining agreement at this meeting.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following Conclusions of Law.

CONCLUSIONS OF LAW

1. That the Respondent Board of Education violated Section 111.70 (3) (a) 1 and 4 of MERA when, on November 18, 1975, it acted unilaterally to implement wages and conditions of employment which were the subject of negotiations for a 1975-76 labor agreement, and which covered the employes in the aforesaid unit of professional teaching personnel represented by the Complainant Union for the 1975-76 school year, when the parties had not bargained to impasse over same.

2. That the Respondent Board of Education violated Section 111.70 (3) (a) 1 and 4 of MERA when, in the middle of the month of December 1975, it acted unilaterally to change the health insurance carrier and policy contrary to the terms of the 1974-75 labor agreement and the terms of the Board's own proposals regarding health insurance during negotiations, at a time when the parties were not at impasse over same.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

IT IS ORDERED that Respondent Board of Education, its officers and agents, shall immediately:

1. Cease and desist from unilaterally implementing wages and conditions of employment which were the subject of negotiations for a 1975-1976 labor contract covering employes in the aforementioned bargaining unit of professional teaching personnel represented by the Complainant Union for the 1975-1976 school year, unless the parties first bargain collectively, to the point of impasse over same.

2. Cease and desist from unilaterally changing the health insurance carrier and policy contained in the 1974-75 labor agreement between the parties which the Board offered to maintain for the 1975-76 contract during negotiations unless the parties first bargain collectively and reach impasse over same.

3. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:

(a) The designated bargaining representatives of the Respondent Board of Education shall, upon request, bargain collectively with Northwest United Educators, and its designated bargaining representatives, as the exclusive representative of all professional teaching personnel in the aforesaid bargaining unit, with respect to wages and conditions of employment for the 1975-76 school year, and if an understanding is reached embody such understanding in a signed agreement and recommend same to the Board for approval.

(b) The Respondent Board of Education shall immediately reinstate the health insurance carrier and policy contained in the parties' 1974-75 labor agreement which was in effect prior to the unilateral change in health insurance made by the Board in the middle of December 1975 unless the parties have since reached agreement on said condition of employment in subsequent negotiations over a labor agreement for the 1976-77 school year.

(c) The Respondent Board of Education shall reinstate the section on personal leave as contained in the parties' 1974-75 labor agreement unless the parties have since reached agreement on said condition of employment in subsequent negotiations over a labor agreement for the 1976-77 school year.

(d) Notify all employes by posting in conspicuous places in its offices where bargaining unit employes are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced or covered by other material.

(e) Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this *21st* day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY *Dennis P. McGilligan*
Dennis P. McGilligan, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify our employes that:

1. WE WILL NOT, absent impasse, unilaterally implement wages and conditions of employment for employes represented by the Complainant Union covering the 1975-76 school year.
2. WE WILL NOT, absent impasse, unilaterally change the health insurance carrier and policy contrary to that contained in the 1974-75 collective bargaining agreement, contrary to our own proposals during negotiations or contrary to terms as agreed to with Northwest United Educators.
3. WE WILL IMMEDIATELY REINSTATE the health insurance carrier and policy contained in the parties' 1974-75 labor agreement unless agreement has been reached with Northwest United Educators over same.
4. WE WILL IMMEDIATELY REINSTATE the provision on personal leave contained in the parties' 1974-75 labor agreement unless agreement has been reached with Northwest United Educators over same.
5. WE WILL BARGAIN COLLECTIVELY regarding the wages and conditions of employment for the 1975-76 school year with Northwest United Educators as the exclusive representative of all professional teaching personnel in the aforesaid bargaining unit.
6. WE WILL NOT in any other or related matter interfere with the rights of our employes, pursuant to the provisions of the Municipal Employment Relations Act.

By _____
Board of Education of Joint School
District No. 1, Towns of Winter et. al.

Dated at _____, Wisconsin this _____ day of _____, 1977.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS
OF FACT, CONCLUSIONS OF LAW AND ORDER

Northwest United Educators filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission on March 22, 1976. Hearing Officer Stephen Schoenfeld conducted a hearing in the matter on April 20, 1976 at Winter, Wisconsin. On June 30, 1976 Stephen Schoenfeld, at the request of the parties, attempted to resolve the issues in the matter but without success. Thereafter, on September 2, 1976 the Commission appointed the undersigned as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the case. A transcript was issued in the matter. Both parties made oral argument at the hearing and did not file briefs.

POSITION OF THE COMPLAINANT:

Complainant Union alleges that the Respondent School District and its Board of Education committed prohibited practices when, absent impasse, the Board acted unilaterally to implement wages, hours and conditions of employment which were the subject of negotiations for a 1975-76 labor contract for the professional teaching personnel in the aforementioned bargaining unit represented by the Complainant Union, and by unilaterally changing health insurance carriers and policies contrary to both the 1974-75 labor agreement between the parties and the Board's own proposals during negotiations.

Complainant Union requests that the Respondent Board be found to have committed prohibited practices; that the Respondent Board be ordered to cease and desist committing such prohibited practices; that the Respondent Board be ordered to rescind any and all unilaterally implemented wages, hours and conditions of employment; that the Respondent Board be ordered to bargain collectively with the Union over wages, hours and conditions of employment for the 1975-76 school year; that the Respondent Board be ordered to post appropriate compliance notices; and that the Commission grant such other relief as may be appropriate.

RESPONDENTS' POSITION:

Respondent Board denies that it committed a prohibited practice by unilaterally implementing wages, hours and conditions of employment into a document which the Board considers a 1975-76 labor contract. Likewise, Respondent Board denies that it committed a prohibited practice by unilaterally changing the health insurance carrier and policy.

Although Respondent Board denied in its Answer that it unilaterally implemented a document covering the wages, hours and conditions of employment for the bargaining unit employees represented by the Complainant Union, the Board never really contested the matter at the hearing. The Respondent Board admits that since November 18, 1975, the Board has refused and failed to bargain collectively with the Complainant Union over the wages, hours and conditions of employment for the 1975-76 school year. However, the Respondent Board feels that the parties were at impasse, and a contract could be implemented under said condition. The Respondent Board feels that negotiations had been less than constructive, and the Union never made any counterproposals. The Board concludes that it had to spend the money by June otherwise the budget would have been reduced by State law.

Respondent Board would have the Examiner deny and dismiss the complaint.

DISCUSSION:

The basic question here is whether the conditions present in the instant case permitted the Municipal Employer to unilaterally implement wages, hours and conditions of employment for the 1975-76 school year which had been the subject of negotiations. The Respondent Board claims that an impasse existed in bargaining with respect to the subjects under discussion which permitted it to do so. The Complainant Union argues that no such impasse existed.

The parties began negotiations over a 1975-76 labor agreement pursuant to Section XVI of the 1974-75 contract which provided that: "the salary schedule, written agreement, and extra pay schedule shall be negotiated annually, starting no later than January, by the Board of Education and the NUE-Winter." The parties met in negotiations over a six month period beginning on May 13, 1975 but without success. On November 18, 1975 the Board unilaterally implemented wages and conditions of employment which were the subject of negotiations for a 1975-1976 labor agreement. The Board unilaterally increased wages in a total amount of \$16,000.00 and unilaterally distributed same among bargaining unit employees, reduced the number of personal leave days from three to one and added a completely new section on funeral leave. Said changes were the same as the Board's last offer to the Complainant Union made on October 2, 1975.

The Commission has held that matters, not concerning basic educational policy, which affect wages, hours and conditions of employment, are subject to mandatory bargaining. 1/ The record is clear that the unilateral changes made by the Board noted above regard items which are mandatory subjects of bargaining. In Racine Unified School District No. 1, 2/ the Commission found that even if the Municipal Employer was justified in believing that an impasse existed when it unilaterally adopted a grievance procedure, the Municipal Employer changed a working condition which was not in issue in negotiations and thereby committed a per se violation of its duty to bargain. Implicit in this holding is a principle of law that if the parties bargain to impasse over a mandatory subject of bargaining, the Municipal Employer can unilaterally implement same. Put another way, absent impasse in negotiations, the Municipal Employer cannot unilaterally change a mandatory subject of bargaining without violating the duty to bargain. This reasoning has been followed in Greenfield School District No. 6, 3/ wherein the Examiner held

"Since a grievance procedure constitutes a condition of employment over which an Employer has a mandatory duty to bargain, it follows that, absent impasse on this issue, an employer cannot unilaterally alter such condition of employment without violating the duty to bargain provided for in Section 111.70(3)(a)4 of MERA." 4/

In the present case, the Municipal Employer unilaterally altered wages and conditions of employment which are mandatory subjects of bargaining. Absent impasse during bargaining, the Employer would

1/ City of Beloit (Schools), 11831-C (9/74), aff'd Wisconsin Supreme Court, 73 Wis. 2nd 43, (6/76).

2/ Decision No. 11313-B, D (4/74).

3/ Decision No. 14026-A (10/76).

4/ Id, at 25.

violate its duty to bargain collectively. The question remains as to the existence of an impasse.

The Examiner is of the opinion that a determination regarding whether a bargaining impasse exists in the present case can be made based on the facts contained in the record. While decisions of the National Labor Relations Board are not generally binding on the Commission the same principles of law have sometimes been applied under MERA. ^{5/} The Examiner finds that factors considered by the Board in determining whether a bargaining impasse has been reached in a given fact situation are applicable herein. The Board in making such a determination relies on a variety of factors. Some of these factors are:

" . . . The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issues to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations. . . ." ^{6/}

In applying the above factors, the Examiner looks at the fact situation herein to determine on the basis of the entire record that no genuine impasse in bargaining existed between the Complainant Union and Respondent Board when, on November 18, 1975 the Board acted unilaterally to implement wages and conditions of employment which were the subject of negotiations for the 1975-76 school year. The Examiner reaches such a conclusion based on the following reasons: (1) there were only four regular bargaining sessions over a six month period prior to the aforementioned unilateral action of the Respondent Board (2) the first meeting was largely exploratory and little bargaining took place (3) several of the bargaining sessions were short in duration (4) it was not until the third regular bargaining session (the only meeting where a state mediator was present) that the Board made its first, and final written offer, and that limited bargaining occurred over same (5) the Union's position was not fixed and uncompromising; rather the Union repeatedly requested to continue negotiations over the proposed labor agreement, made proposals and indicated areas of movement (6) in contrast, the Board's position was continually couched in uncompromising and inflexible language which was interpreted by the Complainant Union as an unwillingness to negotiate in a meaningful manner (7) the Board's failure to notify the Complainant Union that it was intending to unilaterally implement wages and conditions of employment for the 1975-76 school year and (8) the Board's refusal from November 18, 1975 onward to bargain collectively over wages, hours and conditions of employment for the 1975-76 school year.

The National Labor Relations Board has found that the rule absent impasse, an employe may not unilaterally implement its proposals which are under discussion, is not absolute. ^{7/} One circumstance justifying unilateral employer action during negotiations without prior notice to the Union is necessity. ^{8/} The Respondent Board in order to justify its unilateral action contends that it had to spend the money contained in its proposals by June or the Board's budget would have been reduced by State law. This is in the nature of an affirmative defense and the

^{5/} Gateway Vocational, Technical and Adult Education District, Decision No. 14142-A (1/77).

^{6/} See Taft Broadcasting Co., 163 NLRB 475, 64 LRRM 1386 (1967).

^{7/} A.V. Corporation, 209 NLRB 451, 453 (1974).

^{8/} Id.

Respondent Board has the duty to prove said claim by a clear and satisfactory preponderance of the evidence. Since the record lacks any evidence in support of this claim, the Examiner finds that the Respondent Board has not met its burden of proof and rejects this defense.

Based on all of the above, the Examiner finds that no bargaining impasse existed between the parties when, on November 18, 1975, the Respondent Board unilaterally implemented wages and conditions of employment for the professional teaching personnel in the aforementioned bargaining unit for the 1975-76 school year; and that, by taking said unilateral action, the Respondent Board did refuse to bargain collectively with the Complainant Union and thereby did engage in and is engaging in prohibited practices within the meaning of Section 111.70(3)(a)1 and 4 of MERA.

Unilateral Change in Health Insurance:

Respondent Board makes no specific arguments in order to justify its action of unilaterally changing health insurance carriers and policies in the middle of December, 1975.

Where a bargaining impasse is reached, the Employer may make unilateral changes in working conditions, but only to the extent that the changes are consistent with its rejected offers to the Union. 9/ In the instant case, the parties had discussed health insurance at their June 2, 1975 negotiations session. At said meeting, representatives of the Complainant Union asked to change the insurance carrier to the Union's insurance carrier. Ackerman responded on behalf of the Respondent Board that it was happy with the present carrier and would maintain the WPS policy. The parties did not discuss the matter further in negotiations prior to the Board's unilateral change in December. Said change was different from the terms of the parties' 1974-75 labor agreement and the Board's own proposals during negotiations.

Based on the above, the Examiner finds in the instant case where there is no bargaining impasse, and the Municipal Employer makes a unilateral change in a wage or condition of employment contrary to its own offers in negotiations, the Respondent Board's action constituted a violation of its duty to bargain collectively, and the Respondent Board thereby committed prohibited practices within the meaning of Sections 111.70(3)(a)1 and 4 of MERA.

REMEDY:

In the Order the Examiner directs that the designated bargaining representatives of the Respondent Board shall, upon request, bargain collectively with the Complainant Union, and its representatives with respect to wages, and conditions of employment for the 1975-76 school year covering employees in the aforesaid unit. The Examiner further directs that if an understanding is reached such understanding should be recommended to the Board for approval by said bargaining representatives and thereafter, any agreement reached shall be embodied into a signed written agreement. As a correlate the Examiner also orders the Respondent Board to cease and desist from unilaterally implementing wages and conditions of employment which were the subject of negotiations for a 1975-76 labor contract, unless the parties first bargain collectively to impasse over same.

The Examiner also orders the Respondent Board to restore the health insurance carrier and policy and section on personal leave contained in

9/ Almeida Bus Lines, Inc., 333 F 2d 729, 56 LPRM 2548 (CA-1, 1964).

the parties' 1974-75 labor agreement unless said parties have since bargained and reached agreement over same. The Examiner feels these conditions of employment should be reinstated, and not the others, because the Board's unilateral actions in these areas constituted a diminution of benefits to bargaining unit employes.

If the parties are unable to reach agreement pursuant to the aforementioned Order, 10/ a question may again arise as to what constitutes a bargaining impasse under MERA which would justify unilateral Employer implementation of wages, hours and conditions of employment. The Examiner was able to determine that a bargaining impasse did not exist in the instant case based solely upon the factual record and the parties' positions. In doing so the Examiner did not dispose of the larger question raised in the proceeding; namely, to what extent must a Municipal Employer exhaust the statutory impasse procedures set forth in MERA before an impasse can be reached which would justify unilateral Employer implementation of wages, hours and conditions of employment. In light of the limited scope of the Order in this case, 11/ it may yet be necessary for the parties to seek clarification of this issue from the Commission if said parties are unable to reach agreement pursuant to the Examiner's Order.

Dated at Madison, Wisconsin this 21st day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

10/ The duty to bargain in good faith, even on a particular proposal involving a mandatory subject of bargaining, does not require either party to agree or to make a concession. See City of Beloit (Schools), Supra, at 23.

11/ As noted above, the question whether a Municipal Employer must exhaust statutory impasse procedures under MERA before a bargaining impasse can be reached which would justify unilateral Employer implementation of wages, hours and conditions of employment has not been disposed of either by the Findings or Order.